

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DWAYNE EICHLER,

Plaintiff,

No. 2:04-cv-1108 GEB JFM (PC)

vs.

CDC OFFICER SHERBURN, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. §1983. This action is proceeding on claims raised in plaintiff's third amended complaint, filed July 14, 2005, against defendants Mercy Hospital of Folsom (Mercy) and California Department of Corrections and Rehabilitation (CDCR) Correctional Officers Sherburn<sup>1</sup> and Lebeck (Sherburn and Lebeck). By separate orders, summary judgment was entered in favor of Mercy and denied to Sherburn and Lebeck. See Orders filed October 26, 2006 (Mercy) and November 1, 2006 (Sherburn and Lebeck).

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<sup>1</sup> Defendant Sherburn is sometimes identified in the record as Correctional Officer Sherbin. It appears that the correct spelling of said defendant's name is Sherburn. See Ex. B to Defendants' Statement of Undisputed Facts, Declaration of D. Sherburn in Support of Defendants Motion for Summary Judgment, filed January 14, 2011.

On November 21, 2006, plaintiff filed a notice of interlocutory appeal from several orders in this action. On November 29, 2006, defendants Sherburn and Lebeck filed an interlocutory appeal from the order denying summary judgment on the ground of qualified immunity. By order filed December 14, 2006, this action was stayed pending resolution of those interlocutory appeals.<sup>2</sup> By order filed June 23, 2008, the United States Court of Appeals for the Ninth Circuit resolved the interlocutory appeal filed by defendants Sherburn and Lebeck, affirming in part and vacating in part the denial of summary judgment, and remanding the matter for further consideration of the defense of qualified immunity. After intervening proceedings, on January 14, 2011, defendants Sherburn and Lebeck filed a motion for summary judgment, which is presently before the court. On March 1, 2011, plaintiff filed an opposition to the motion for summary judgment together with statements of disputed and undisputed facts, and on June 29, 2011, defendants filed a reply brief and objections to plaintiff's opposition.<sup>3</sup>

#### SUMMARY JUDGMENT STANDARDS UNDER RULE 56

Summary judgment is appropriate when it is demonstrated that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under summary judgment practice, the moving party

always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary

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<sup>2</sup> Plaintiff's appeal was dismissed on January 19, 2007.

<sup>3</sup> After defendants Sherburn and Lebeck filed their motion for summary judgment, the court appointed counsel to represent plaintiff in this matter. Plaintiff subsequently moved to relieve his counsel and counsel moved to withdraw; the latter motion was granted by order filed June 21, 2011.

1 judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers  
2 to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered,  
3 after adequate time for discovery and upon motion, against a party who fails to make a showing  
4 sufficient to establish the existence of an element essential to that party’s case, and on which that  
5 party will bear the burden of proof at trial. See id. at 322. “[A] complete failure of proof  
6 concerning an essential element of the nonmoving party’s case necessarily renders all other facts  
7 immaterial.” Id. In such a circumstance, summary judgment should be granted, “so long as  
8 whatever is before the district court demonstrates that the standard for entry of summary  
9 judgment, as set forth in Rule 56(c), is satisfied.” Id. at 323.

10           If the moving party meets its initial responsibility, the burden then shifts to the  
11 opposing party to establish that a genuine issue as to any material fact actually does exist. See  
12 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to  
13 establish the existence of this factual dispute, the opposing party may not rely upon the  
14 allegations or denials of its pleadings but is required to tender evidence of specific facts in the  
15 form of affidavits, and/or admissible discovery material, in support of its contention that the  
16 dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party  
17 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome  
18 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
19 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.  
20 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could  
21 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,  
22 1436 (9th Cir. 1987).

23           In the endeavor to establish the existence of a factual dispute, the opposing party  
24 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
25 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
26 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary

1 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a  
2 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory  
3 committee’s note on 1963 amendments).

4 In resolving the summary judgment motion, the court examines the pleadings,  
5 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
6 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,  
7 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the  
8 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.  
9 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to  
10 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen  
11 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.  
12 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply  
13 show that there is some metaphysical doubt as to the material facts . . . . Where the record taken  
14 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no  
15 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

16 On October 22, 2004, the court advised plaintiff of the requirements for opposing  
17 a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154  
18 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999), and Klinge v.  
19 Eikenberry, 849 F.2d 409 (9th Cir. 1988).

#### 20 ANALYSIS

21 This action is proceeding on claims raised in plaintiff’s third amended complaint,  
22 filed July 14, 2005. The claims arise from an incident at California State Prison-Sacramento on  
23 June 1, 2003 when plaintiff was slashed by another inmate with an inmate-manufactured weapon.  
24 Plaintiff alleges that defendants Sherburn and Lebeck violated his rights under the Eighth  
25 Amendment by acting with deliberate indifference to plaintiff’s safety. Plaintiff also raises a  
26 state law negligence claim against these two defendants.

1 As noted above, on November 1, 2006, a summary judgment motion filed by  
2 defendants Sherburn and Lebeck was denied by the district court. By order filed June 23, 2008,  
3 the United States Court of Appeals for the Ninth Circuit remanded the matter for further  
4 consideration of the defense of qualified immunity. Following a second order remanding claim  
5 against Mercy Hospital, the court of appeals directed the court to reconsider whether to exercise  
6 supplemental jurisdiction over plaintiff's state law claims, see Eichler v. Sherbin, No. 08-16404,  
7 slip op. at 5 (9th Cir. 2010), and this court subsequently issued an order that provided, inter alia,  
8 that this action would proceed on plaintiff's state law negligence claim. See Order filed July 21,  
9 2010 at 2. By the instant motion, defendants Sherburn and Lebeck seek summary judgment on  
10 the merits of plaintiff's Eighth Amendment and negligence claims, contending that their acts or  
11 omissions were not the proximate cause of plaintiff's injuries. Defendants also seek summary  
12 judgment on plaintiff's Eighth Amendment claim on the ground of qualified immunity.

13 I. Undisputed Facts

14 On June 1, 2003, plaintiff was incarcerated at California State Prison-Sacramento  
15 (CSP-Sacramento). Defendants Sherburn and Lebeck were correctional officers both stationed at  
16 CSP-Sacramento. Defendants Sherburn and Lebeck were supervising plaintiff's housing unit on  
17 June 1, 2003.

18 Plaintiff was housed in building B-3. Building B-3 is split into three wedges,  
19 which are called A, B and C blocks. Each of these housing units are divided by walls. There is a  
20 control booth in the middle of building B-3. The control booth is located on the second floor of  
21 the building. This position provides the control booth operator an unobstructed view of all the  
22 cells in the building.

23 On June 1, 2003, CSP-Sacramento was on a lockdown. Because of the lockdown,  
24 most of the inmates in B-3 were confined to their cells. During the lockdown, B-3 was searched  
25 for weapons. Approximately three days before June 1, 2003, plaintiff was allowed out of his cell  
26 to resume some aspects of his job as a porter. Ex. F to Defendants' Motion for Summary

1 Judgment, Deposition of Dwayne Eichler (Pl.'s Dep.) at 18:17-19:1. This release was pursuant  
2 to a "phased unlock" pursuant to which some inmates were preapproved to be released from the  
3 lockdown to return to work. Ex. C to Defendants' Motion for Summary Judgment, Declaration  
4 of Steve Vance in Support of Motion for Summary Judgment (Vance Declaration), at ¶ 5.

5 On May 27, 2003, Correctional Captain Steve Vance wrote a memorandum  
6 setting forth guidelines for the phased unlock of CSP-Sacramento. Id. at ¶ 7. The memorandum  
7 required escorts for all Level IV White, Black, and Southern Hispanic inmates. Ex. D to  
8 Defendants' Motion for Summary Judgment. The memorandum further provided for approved  
9 workers to resume work on May 28, 2003. Id. The memorandum did not require porters to be  
10 escorted. Vance Declaration at ¶¶ 8-10. The "Escorts" section of the memorandum did not  
11 apply to inmate workers. Id. at ¶¶ 10-11.

12 On June 1, 2003, defendant Lebeck was supervising the inmates in B-3 from the  
13 control booth. Officer Bristow and defendant Sherburn were supervising inmates on the floor of  
14 B-3. Plaintiff and approximately five other porters were released to collect food trays in B-3.

15 At some point when plaintiff was working in A block, defendant Sherburn  
16 indicated that he was going to leave the floor. Plaintiff told defendant Sherburn that he didn't  
17 believe porters should be left alone during the lockdown because of the ongoing problems with  
18 violence in the prison. Pl.'s Dep. 19:12-23:14. Plaintiff did not, however, actually expect that he  
19 would be slashed. Id. at 23:14-16. During the conversation, defendant Sherburn said to plaintiff,  
20 "Well, look, don't pick the trays up till I get back." Id. at 24:8-9. Plaintiff stated that they would  
21 wait for some period of time, and defendants Sherburn and Lebeck both agreed that if defendant  
22 Sherburn was not back plaintiff and the other porters should go ahead and pick up the trays. Id.  
23 at 25:5-24. He subsequently had a similar conversation with defendant Lebeck about picking up  
24 trays with only one other inmate porter. Id. at 28:7-29:8.

25 Inmates Austin and Gates occupied cell 211 in A block. Id. at 30:5-11. Plaintiff  
26 approached cell 211, and as he picked up their trays Austin started screaming. Id. at 31:2-5.

1 Austin's conduct upset plaintiff, and plaintiff "grabbed their trays and set them down in front of  
 2 their cell." *Id.* at 31:18-23, 33:20-24. Plaintiff returned to his cell to "cool off" and wash his  
 3 face. *Id.* at 34:24-35:10. Subsequently, plaintiff again approached cell 211. *Id.* at 35:21. After  
 4 briefly speaking with Gates, plaintiff walked back toward his cell. *Id.* 36:1-37:6. Subsequently,  
 5 plaintiff returned one more time to area of cell 211. *Id.* at 57:11. He started to walk away again,  
 6 but Austin persuaded plaintiff to come back to cell 211. *Id.* at 57:24. Plaintiff was talking with  
 7 Austin through the food port when, without any warning, Austin slashed plaintiff with an inmate-  
 8 manufactured weapon. *Id.* at 60:18-24. Plaintiff had not seen anything so fast in his life. *Id.*

9 Defendant Lebeck did not know plaintiff was having any conflict with inmates  
 10 Austin and Gates, and plaintiff did not tell him. *Id.* at 48:18-22. Sherburn did not know either.  
 11 *See id.* at 49:18-50:7.

## 12 II. Defendants' Motion

### 13 A. Eighth Amendment Claim

14 Defendants seek summary judgment on plaintiff's Eighth Amendment claim on  
 15 two grounds. First, defendants contend that they were not deliberately indifferent to any known  
 16 risk of harm to plaintiff, and none of their acts or omissions were the proximate cause of  
 17 plaintiff's injuries. Second, defendants contend they are entitled to qualified immunity.

18 The Court of Appeals' order remanding this matter for consideration of the  
 19 defense of qualified immunity provides in relevant part:

### 20 **Legal Standard**

21 In *Saucier v. Katz*, 533 U.S. 194 (2001), the United States  
 22 Supreme Court set forth a two-part test for qualified immunity. *Id.*  
 23 at 201. First, a court must consider whether, based on the facts  
 24 alleged in the light most favorable to the plaintiff, the officers  
 25 violated a constitutional right. *Id.* If no constitutional right was  
 26 violated, then there is no further inquiry. *Id.* Second, if a right was  
 potentially violated, the court must consider whether the right at  
 issue was clearly established. *Id.*

### **Discussion**

1 As to the first part of the *Saucier* analysis, we affirm the  
2 district court's determination that genuine issues of material fact  
3 preclude entry of summary judgment on whether Appellants'  
4 conduct violated the Eighth Amendment. Whether Appellants  
5 acted with deliberate indifference by failing to escort Eichler  
6 during the prison lockdown is a question of fact. The district court,  
7 in adopting the findings and recommendations of the magistrate  
8 judge, correctly pointed out that the safety concerns that were the  
9 basis for the lockdown and the escort policy that Appellants did not  
10 follow may support an inference that Appellants acted with  
11 deliberate indifference to a substantial risk that Eichler would be  
12 harmed. See *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (stating  
13 that a prison official cannot be liable for failing to protect one  
14 inmate from another unless the official acted with deliberate  
15 indifference to a substantial risk that the inmate would be harmed).  
16 Because this inference and the disputed facts are sufficient on this  
17 record for a reasonable jury to conclude that Appellants violated  
18 Eichler's Eighth Amendment rights, we must proceed to the second  
19 part of the *Saucier* analysis.

20 To determine whether the right allegedly violated was  
21 "clearly established," the court must determine, in light of the  
22 *specific* context of the case, "whether it would be clear to a  
23 reasonable officer that his conduct was unlawful in the situation he  
24 confronted." *Saucier*, 533 U.S. at 202. "If the law did not put the  
25 officer on notice that his conduct would be clearly unlawful,  
26 summary judgment based on qualified immunity is appropriate."  
*Id.* This would be true even if Appellants actually violated  
Eichler's Eighth Amendment rights. *Hope v. Pelzer*, 536 U.S. 730,  
739 (2002). By contrast, where "courts have agreed that certain  
conduct is a constitutional violation under facts not distinguishable  
in a fair way from the facts presented in the case at hand," the  
officers are not entitled to summary judgment on qualified  
immunity. *Saucier*, 533 U.S. at 202.

... The particularized inquiry required here is whether  
Appellants violated a clearly established constitutional right by  
failing to escort Eichler while he was out of his cell during the  
prison lockdown. The district court did not consider this issue, but  
instead concluded that summary judgment on qualified immunity  
was inappropriate because a reasonable jury could conclude that  
Appellants had violated Eichler's Eighth Amendment rights.

Accordingly, we must remand for the district court to  
determine whether there existed any analogous facts, circumstance  
or authority for the proposition that, under the specific  
circumstances of this case, Appellants should reasonably have  
known they were violating Eichler's constitutional rights. See

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1 *Hope*, 536 U.S. at 739 (holding that the unlawfulness of a clearly  
2 established right must be apparent from existing authorities).

3 Order filed June 23, 2008, at 2-5.

4 In Estate of Ford v. Palmer, 301 F.3d 1043 (9th Cir. 2002), the United States  
5 described the appropriate inquiry for determining whether a rule of law is “clearly established”  
6 for purposes of qualified immunity:

7 [T]he Court has emphasized that determining whether the law  
8 was clearly established “must be undertaken in light of the specific  
9 context of the case, not as a broad general proposition.” Saucier,  
10 533 U.S. at 201. Therefore, it is not sufficient that Farmer [v.  
11 Brennan] clearly states the general rule that prison officials cannot  
12 deliberately disregard a substantial risk of serious harm to an  
13 inmate; here, in addition, it is relevant that neither Farmer nor  
14 subsequent authorities has fleshed out “at what point a risk of  
15 inmate assault becomes sufficiently substantial for Eighth  
16 Amendment purposes.” Farmer, 511 U.S. at 834 n. 3; cf. Helling v.  
17 McKinney, 509 U.S. 25, 36, 113 S.Ct. 2475, 125 L.Ed.2d 22  
18 (1993) (indicating in second-hand smoke case that a risk is  
19 intolerable under the Eighth Amendment when it violates  
20 contemporary standards of decency to expose anyone unwillingly  
21 to it).

22 Estate of Ford, at 1050-51. The appropriate inquiry here is whether it would have been clear to a  
23 reasonable correctional officer in defendants’ position that plaintiff faced a substantial risk of  
24 serious harm if left to collect food trays with one inmate porter but no correctional officer  
25 supervision. Under the undisputed facts of this case, this court finds that the answer to that  
26 question is no.

At the time of the incident at bar CSP-Solano was on a phased unlock pursuant to  
which some inmate workers, including plaintiff, were preapproved to resume working on the  
tiers. The rest of the inmates, including Austin, were locked in their cells, and all the cells had  
recently been searched for weapons. While plaintiff expressed general concern about violence to  
defendants Sherburn and Lebeck, he also stated that he could and would resume picking up food  
trays if defendant Sherburn did not return after a certain period of time. Plaintiff did not inform  
either defendant Sherburn or defendant Lebeck of any concern for his safety arising from his

1 encounters with inmates Austin and Gates after he picked up the food trays at cell 211. Perhaps  
 2 most importantly, plaintiff was not assaulted while picking up the food trays at cell 211. Rather,  
 3 he returned to the cell twice after he had retrieved the trays and was assaulted the second time he  
 4 returned to the cell.

5 For the foregoing reasons, this court finds that it would not have been clear to a  
 6 reasonable correctional officer in defendant Sherburn or Lebeck's position that plaintiff faced a  
 7 substantial risk of harm from being left with one other inmate to complete his porter duties.  
 8 Accordingly, defendants Lebeck and Sherbin are entitled to qualified immunity from liability on  
 9 plaintiff's Eighth Amendment claim.

#### 10 B. Negligence

11 Defendants also seek summary judgment on plaintiff's negligence claim on the  
 12 ground that Austin's assault on plaintiff was an independent act that was not reasonably  
 13 foreseeable to either defendant.

14 "To establish liability in negligence, it is a fundamental  
 15 principle of tort law that there must be a legal duty owed to the  
 16 person injured and a breach of that duty which is the proximate  
 17 cause of the resulting injury." Jacoves [v. United Merchandising  
Corp.], 11 Cal.Rptr.2d [468] at 484 [(Cal.App.2nd Dist. 1992)].  
 18 Proximate cause "limits the defendant's liability to those  
 19 foreseeable consequences that the defendant's negligence was a  
 20 substantial factor in producing." Mendoza v. City of Los Angeles,  
 21 66 Cal.App.4th 1333, 78 Cal.Rptr.2d 525, 530 (1998). Whether an  
 22 act is the proximate cause of injury is generally a question of fact;  
 23 it "is a question of law where the facts are uncontroverted and only  
 24 one deduction or inference may reasonably be drawn from those  
 25 facts." Garman v. Magic Chef, Inc., 117 Cal.App.3d 634, 173  
 26 Cal.Rptr. 20, 22 (1981).

22 Ileto v. Glock, Inc., 349 F.3d 1191, 1206 (9th Cir. 2003). Assuming arguendo that defendants  
 23 breached a duty of care owed to plaintiff, the undisputed facts permit only one inference: that  
 24 plaintiff's decision to return to cell 211 twice under the circumstances he described was not a  
 25 foreseeable consequence of defendant Sherburn and Lebeck's decisions to leave the area where

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1 plaintiff was collecting food trays, and those decisions were not the proximate cause of plaintiff's  
2 injury.

3 For the foregoing reasons, this court finds that defendants are entitled to summary  
4 judgment on plaintiff's negligence claim.

5 For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that the  
6 January 14, 2011 motion of defendants Sherburn and Lebeck for summary judgment be granted.

7 These findings and recommendations are submitted to the United States District  
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
9 days after being served with these findings and recommendations, any party may file written  
10 objections with the court and serve a copy on all parties. Such a document should be captioned  
11 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that  
12 failure to file objections within the specified time may waive the right to appeal the District  
13 Court's order. Martinez v. Ylst, 95 1 F.2d 1153 (9th Cir. 1991).

14 DATED: August 8, 2011.

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17 UNITED STATES MAGISTRATE JUDGE

18 12  
19 eich1108.msJ